IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANTHONY VIDAL ARMENTA,
Appellant.

No. 2 CA-CR 2018-0164
Filed September 27, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201601767
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Anthony Armenta appeals his conviction for participating in a criminal street gang. For the reasons that follow, we affirm Armenta's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Armenta. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In 2010, while Armenta was incarcerated, he attempted to mail an envelope, which was intercepted by officers of the Arizona Department of Corrections (DOC) and placed in his security-threat-group (STG) file.[1] The envelope was addressed to U.M. and contained three handwritten letters: one was not addressed to anyone specifically, one was addressed to A.M., and one to J.

¶3 The first letter, which was not addressed to anyone specifically, was signed "Anthony" and instructed the intended recipient to send the other letters addressed to A.M. and J. The letter also included A.M.'s DOC inmate number and said "one goes to Jay." A detective testified that A.M. was a member of the Arizona Mexican Mafia (AMM), a prison gang.

¶4 The letter to A.M. said Armenta had arrived in Tucson because of B.U., instructed A.M. to "[k]eep this nombre [name] in mind," and described B.U. as a "xixa rata," which is AMM slang for "snitch" or "rat." The letter was dated February 1, 2010, and was not signed, but the handwriting matched the other letters in the envelope, which were signed "Anthony," and other documents with Armenta's handwriting.

¶5 The letter to J. was dated February 10, 2010, and included references to the Aztec sun god, an important symbol to the AMM, and

[1]A security threat group is the DOC term for a prison gang. DOC keeps records of inmates suspected of being gang members in STG files.

instructed J. to give a message to someone else. This letter was signed "Anthony" and included Armenta's nickname, "Azcatl."

¶6 Based on the letters, the state charged Armenta with one count of participating in a criminal street gang by "intentionally organizing, managing, directing, supervising or financing a criminal street gang with the intent to promote or further the criminal objectives of the criminal street gang" in violation of A.R.S. § 13-2321(A)(1).[2] During his five-day trial, the state presented testimony from multiple law enforcement officers and experts showing Armenta's affiliation with the AMM and the Vario Guadalupe Locos (VGL), a criminal street gang, testimony that Armenta had written the letters, and the actual letters themselves.

¶7 Following a jury trial, Armenta was convicted of participating in a criminal street gang, and this appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶8 On appeal, Armenta argues: (1) there was insufficient evidence to support his conviction of participating in a criminal street gang; (2) the trial court's refusal to question each juror about whether they had seen a newspaper article that linked Armenta to the murder of B.U. deprived him of his Sixth and Fourteenth Amendment rights to an impartial jury; and (3) the court erred in admitting various documents and a photo of Armenta's VGL tattoo.

Sufficiency of Evidence

¶9 Sufficiency of the evidence is a question of law we review de novo, *Felix*, 237 Ariz. 280, ¶ 30, and we will reverse "only if no substantial evidence supports the conviction," *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009) (quoting *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005)). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290 (1996). "Sufficient evidence may be comprised of both direct and circumstantial evidence and be substantial enough for a reasonable person to determine that it supports a verdict of guilt beyond a reasonable doubt." *Felix*, 237 Ariz. 280, ¶ 30 (citation omitted). "If reasonable persons could differ on whether the

[2]The state did not argue that Armenta had financed the gang.

evidence establishes a fact at issue, that evidence is substantial." *State v. Garfield*, 208 Ariz. 275, ¶ 6 (App. 2004).

¶10 Armenta argues there was insufficient evidence to support his conviction because "[t]here was no evidence that [he] was ever a full-fledged member of the AMM. It was unclear what [his] status was with AMM on February 1, 2010, the date the alleged crime was committed." He further contends that he "didn't have either the authority or ability to" organize, manage, direct, or supervise the gang's activities. Armenta further contends that "[w]ithout proof of this essential element," there was insufficient evidence to convict him. He also asserts "the 2010 letter was nothing more than passing along information" and "was not giving an order or directing anyone to do anything," and that passing along information does not meet "the common definition" of organizing, managing, directing, or supervising a criminal street gang.

¶11 The state counters that § 13-2321(A)(1) does not require the state to prove that a person who organizes, manages, directs, or supervises a criminal street gang necessarily has the authority to give orders or direction to others. The state also argues "the plain language of the statute does not even require any showing that the person was a member of the criminal street gang." Finally, the state asserts that because § 13-2321(A)(1) does not define the terms "organize," "manage," "direct," or "supervise," this court should give those words their ordinary meanings, and under the ordinary meanings, Armenta's actions satisfy § 13-2321(A)(1).[3] We agree.

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[3]The state also argues that under *State v. Hernandez*, 246 Ariz. 407 (App. 2019), "§ 13-2321(A) requires evidence of a completed communication when the basis for the charge is a form of communication such as a letter" and that, therefore, we should reduce Armenta's conviction to attempted participation in a criminal street gang and remand for resentencing. We disagree. *Hernandez* requires a completed communication only for "[k]nowingly inciting or inducing others to engage in violence or intimidation" under § 13-2321(A)(2) or "[f]urnishing advice or direction" to a criminal street gang under § 13-2321(A)(3), not for "organizing, managing, directing, [or] supervising" under (A)(1). *Id.* ¶¶ 7-11. In *Hernandez*, the court concluded that although Hernandez's intercepted letters did not reach their intended recipients, "they contained evidence from which the jurors could conclude that Hernandez had organized, managed, directed, or supervised gang activity." *Id.* ¶ 9. Thus, *Hernandez* does not require us to reduce Armenta's conviction.

¶12 We review issues of statutory interpretation de novo and "[w]hen the statute's plain language is clear, we will not resort to other methods of statutory interpretation, 'such as the context of the statute, its historical background, its effects and consequences, and the spirit and purpose of the law.'" *State v. Hernandez*, 246 Ariz. 407, ¶¶ 8, 12 (App. 2019) (quoting *State v. Gray*, 227 Ariz. 424, ¶ 5 (App. 2011)). In relevant part, § 13-2321(A)(1) provides: "A person commits participating in a criminal street gang by . . . [i]ntentionally organizing, managing, directing, supervising or financing a criminal street gang with the intent to promote or further the criminal objectives of the criminal street gang." Contrary to Armenta's argument, the statute does not require the defendant to have the authority to organize, manage, direct, or supervise the gang activity. *See* § 13-2321(A)(1). And although Armenta appears to admit he is an AMM member, as the state argues, the statute does not require a person to be a member of a gang in order to participate in it. Therefore, Armenta's argument that he could not be guilty of participating in a criminal street gang because he did not have the authority to organize, manage, direct, or supervise the gang fails as a matter of law.

¶13 Because the statute does not define the terms "organizing," "managing," "directing," or "supervising," we give those words their ordinary meaning. *See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."); *see also State v. Cox*, 217 Ariz. 353, ¶ 20 (2007) ("In the absence of statutory definitions, we give words their ordinary meaning."). Specifically, the ordinary meaning of "direct" is to "manage or regulate the business or affairs of . . . To give an order to; command . . . To indicate the intended recipient on (a letter, for example) . . . To give commands or directions." American Heritage Dictionary 511 (5th ed. 2011).

¶14 Viewing the evidence in the light most favorable to sustaining the jury's verdict and resolving all reasonable inferences against Armenta, *see Felix*, 237 Ariz. 280, ¶ 30, there was sufficient evidence to convict him of participating in a criminal street gang by directing its activities. The letter to A.M. stated: "Keep this nombre in mind. This levas is from home [B.U.] xixa rata." At trial, the state's gang expert explained that "levas" was slang for "bitch," that "xixa rata" is AMM slang for "rat" or "snitch," and that Armenta's letter was informing A.M. that B.U. had snitched. The gang expert also testified that being called a "levas" is the "ultimate disrespect" and that when the AMM identifies someone as a snitch, "they would target that individual to be killed." Thus, a reasonable jury could have found Armenta directed gang activity by telling A.M.—a validated AMM member—to keep a snitch's name in mind.

¶15 Although J. was never identified at trial, the letter addressed to him directed him to give a message to someone else and included Armenta's nickname. And, the unaddressed letter was in the envelope addressed to U.M. and presumably intended for her, as it stated: "I got a few letters that need to get to these fellas. It's very appreciated!" Based on these letters, reasonable jurors could have found that Armenta had directed, ordered, or commanded U.M. to send the other letters or that he had indicated the intended recipients of his letters, A.M. and J., in his letter to U.M., thus directing gang activities under § 13-2321(A)(1). *See* American Heritage Dictionary 511 (5th ed. 2011). Therefore, the letters were substantial and sufficient evidence from which reasonable jurors could conclude Armenta had participated in a criminal street gang. *See* § 13-2321(A)(1).

Newspaper Article

¶16 Armenta argues the trial court erred in refusing to investigate whether any of the jurors had seen a newspaper article that linked him to B.U.'s murder and whether it would influence their decisions. We review the court's decision concerning whether to investigate allegations of juror misconduct for an abuse of discretion. *See State v. Miller*, 178 Ariz. 555, 556 (1994).

¶17 At the beginning of trial, the jury was instructed not to consult newspapers, to avoid media coverage of the trial, and to inform the trial court immediately if they encountered news about the case. During trial, a local newspaper published an article linking Armenta to B.U.'s murder. Armenta's counsel informed the court and requested "an in-camera discussion with each juror" to determine whether any of them had seen or read the article, but did not allege any of the jurors had actually read the newspaper. The court denied Armenta's request and re-read its admonition instructing the jury not to read the news and to alert the court immediately if they encountered anything about the case in the media.

¶18 Armenta argues "[a]ll that is needed to trigger the trial court's duty to investigate is that the newspaper article related to a material fact or law at issue in the case," relying on *State v. Davolt*, 207 Ariz. 191 (2004), and *United States v. Thompson*, 908 F.2d 648 (10th Cir. 1990). He further asserts the article "went to highly prejudicial material" and "gave the jurors information that the trial court had explicitly precluded from Armenta's trial." Armenta contends the court's refusal to question each juror "was inadequate to protect [his] Sixth and Fourteenth Amendment rights to be tried by an impartial jury." Thus, he argues, this error warrants a remand

for an evidentiary hearing to determine whether any of the jurors read the newspaper article and whether a new trial is necessary. We disagree.

¶19 In *Davolt*, our supreme court concluded that "bare allegations of juror misconduct," such as reading the newspaper during the trial, were insufficient to trigger the trial court's duty to investigate. 207 Ariz. 191, ¶ 57. In that case, Davolt alleged three jurors were either heard saying they had read or were seen carrying a newspaper during the trial. *Id.* ¶ 53. Davolt did not, however, claim that any of the newspapers purportedly read or carried by the jurors contained articles concerning the trial, and there was no evidence of there being an article about his case in any of the newspapers. *Id.* ¶ 57. Therefore, our supreme court explained: "A trial court's duty to investigate alleged incidents of juror misconduct arises only if there is an allegation that the newspaper articles related to a material fact or law at issue in the case." *Id.* ¶ 56. According to Armenta, under this single sentence from *Davolt*, the court's duty to investigate arises from the mere existence of an article related to the case.

¶20 But, on its face, the sentence does not support Armenta's argument; indeed, it expressly contemplates actual "alleged incidents of juror misconduct" in addition to the publishing of a newspaper story. Thus, *Davolt* requires that there be an article related to the case *in addition to* an allegation or evidence of a juror reading the news during trial. Further, the standard proposed by Armenta—a duty to investigate even without an allegation of actual juror misconduct—would be unworkable in any trial subject to significant, continuing press coverage. *See State v. Newell*, 212 Ariz. 389, ¶ 68 (2006) ("We presume that the jurors followed the court's instructions.").

¶21 In *Thompson*, the Tenth Circuit held the trial court abused its discretion by failing to inquire whether the jurors had read a highly prejudicial article about Thompson that appeared in the local newspaper during trial. 908 F.2d at 650-52. The local newspaper had printed an article about the case during trial, and Thompson alleged that two jurors had been seen reading the local newspaper and another juror had been reading a national newspaper during trial. *Id.* at 649-50. The court denied Thompson's request to ask all of the jurors individually whether they had read the article and instead asked the group whether "anything occurred during the weekend that would in any way affect [their] ability to continue to serve as fair and impartial jurors." *Id.* at 650. The Tenth Circuit concluded the allegations of jurors reading the newspaper and the "highly prejudicial nature of the article" required the court to ask the jurors whether they had read the article. *Id.* at 650-52. Thus, *Thompson* and *Davolt* both

require a trial court to investigate whether jurors have read a news article about the case only when there is both a newspaper article related to a material fact or issue in the case *and* an allegation that a juror read the newspaper.

¶22 The case at hand is factually distinguishable. Although the local newspaper published an article related to Armenta's case during his trial, he did not allege that any juror had actually read it. Absent an allegation that a juror had read the local newspaper—or any other newspaper for that matter—the court was not required to ask the jurors if they had read the article. Therefore, the court did not abuse its discretion in declining Armenta's request and instead reiterating its instruction admonishing the jury not to read any news articles related to the case. *See Davolt*, 207 Ariz. 191, ¶ 57; *Thompson*, 908 F.2d at 650-52.

Admission of Gang-Related Evidence

¶23 Armenta argues the trial court erred in admitting documents from his STG file, bail-bond documents bearing his signature, and a photo of his VGL tattoo. We review a court's ruling on the admission of evidence for an abuse of discretion. *State v. Payne*, 233 Ariz. 484, ¶ 56 (2013).

STG File Documents

¶24 At trial, the gang expert testified that in the course of an investigation for a different case, he had found several gang-related documents in Armenta's STG file, including: the three letters in the envelope addressed to U.M., a ledger with names and what appear to be DOC inmate numbers, an envelope with a code, and a document about his duties as a low-level AMM member known as a "tema." Each document was handwritten. Armenta objected to the letters, ledger, envelope, and tema document on the grounds of foundation and relevance, and he was overruled.

¶25 On appeal, Armenta argues his trial "was littered with all sorts of evidentiary issues" because the documents taken from his STG file—in particular, the letter he had written to A.M.—lacked a chain of custody and some were undated. Specifically, he asserts the lack of foundation for these documents "made it impossible to determine their relevance to the charge here." Armenta also notes that the letters were dated February 1 and February 10, 2010, but no charges were filed until 2016, when the gang expert came across the documents in the course of a different investigation, and that the gang expert did not know how or when each of the documents had been added to Armenta's STG file.

¶26 The state counters that foundation was established through the gang expert's testimony that he had obtained the documents from Armenta's STG file. The state further argues Armenta's concerns about not knowing when and how the documents were put in his STG file "go to the weight of the evidence, not its admissibility." The state also contends the letters were all admissible as party-opponent statements under the Arizona Rules of Evidence and that the ledger, envelope with the code, and document about being a tema were all relevant to showing Armenta had participated in a criminal street gang.

¶27 "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). "Such a foundation may be laid by evidence either identifying the item or establishing chain of custody." *State v. Steinle*, 239 Ariz. 415, ¶ 24 (2016). "Rule 901 does not invariably require chain of custody testimony," but instead may be satisfied by having a witness testify that the item is what it is claimed to be. *Id.* ¶ 25; *see also* Ariz. R. Evid. 901(b)(1); *State v. Emery*, 141 Ariz. 549, 551 (1984) (party can lay foundation with witness testimony that item is what it is claimed to be). Further, the trial court "does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Lavers*, 168 Ariz. 376, 386 (1991). And, "[f]laws in the chain of custody normally go to the weight the jury gives to the evidence, not to its admissibility into evidence." *State v. Morales*, 170 Ariz. 360, 365 (App. 1991).

¶28 Here, the state asserted the three letters in the envelope, the envelope with the code, and the document about being a tema were from Armenta's STG file. The state's gang expert testified that he had obtained them from Armenta's STG file by contacting the DOC's STG supervisor in connection with another investigation. Moreover, the state's handwriting expert testified that the documents in Armenta's STG file "were probably written by the individual that executed [certain bail-bond documents and a DOC visitation form]" known to have been written by Armenta, *infra* ¶¶ 31-32. Thus, although the state did not present a clear chain of custody for the documents before they were placed in Armenta's STG file, sufficient evidence existed from which the jury could have reasonably concluded the documents were written by Armenta. *See* Ariz. R. Evid. 901(a), (b)(1); *Steinle*, 239 Ariz. 415, ¶ 24; *see also State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012) (affirm trial court ruling if legally correct for any reason). Nor does Armenta demonstrate how a missing link in the chain of custody as to this particular evidence would have affected its reliability.

¶29 Evidence is relevant and admissible if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402. Although generally admissible, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403. "Evidence of gang affiliation is admissible when it is relevant to a material issue in the case." *State v. Jackson*, 186 Ariz. 20, 26 (1996). And, self-proclamation and written correspondence are two of the seven criteria in A.R.S. § 13-105(9) that indicate membership in a criminal street gang.

¶30 Here, the documents were admissible because the letters underlying the charge, the ledger, the envelope with the code, and the document concerning tema duties all had a tendency to make Armenta's membership in the AMM more probable. And, because evidence of his gang affiliation was relevant to the material issue of whether he had participated in a criminal street gang, *see Jackson*, 186 Ariz. at 26, the trial court did not abuse its discretion in admitting the documents, *see Payne*, 233 Ariz. 484, ¶ 56.

Bail-Bond Documents

¶31 The state introduced documents from a bail-bonds company and a DOC visitation form with Armenta's handwriting for the purpose of matching his handwriting on those known documents to those in his STG file. The gang expert testified that the DOC visitation form was in Armenta's file and that he had obtained the bail-bond documents from a bail-bonds company Armenta had previously used. Armenta objected on the grounds of foundation and hearsay, and was overruled.

¶32 On appeal, Armenta maintains his argument that the bail-bond documents were inadmissible hearsay because the gang expert's "testimony didn't meet the conditions of Ariz. R. Evid. 803(6)" and "were not accompanied by a certification under Ariz. R. Evid. 902(11)." He asserts the admission of the bail-bond documents prejudiced him because the handwriting expert used those examples of Armenta's signature to identify his signature on the letters in his STG file.[4]

[4]Armenta does not maintain his argument about the prison visitation form on appeal and, therefore, has abandoned any such argument. *See* Ariz.

¶33 The state argues the bail-bond documents were not hearsay because they were not statements offered for the truth of the matter asserted and were properly admitted "for the sole purpose of illustrating the expert's testimony about comparing the writings and so the jurors could compare the writings themselves." The state further contends that even if the documents were statements under Rule 801, Ariz. R. Evid., they were not hearsay because they were admissible party-opponent statements under Rule 801(d)(2), and that if any error occurred, it was harmless.

¶34 Hearsay is an out-of-court statement offered "in[to] evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c); *see also State v. Lopez*, 217 Ariz. 433, ¶ 8 (App. 2008). A statement is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Ariz. R. Evid. 801(a). Hearsay statements are generally inadmissible, unless they fall within a recognized exception. Ariz. R. Evid. 802; *see also Lopez*, 217 Ariz. 433, ¶ 8. One such exception is a statement made by an opposing party. Ariz. R. Evid. 801(d)(2)(A).

¶35 Here, even were we to conclude that the bail-bond documents were statements for purposes of Rule 801, the trial court did not abuse its discretion by admitting them. *See Payne*, 233 Ariz. 484, ¶ 56. As noted by the court, the documents were not offered for the truth of the matter asserted in them. Rather, they were offered for the limited purpose of providing the state's handwriting expert with known examples of Armenta's handwriting to use in his analysis. Furthermore, even if the bail-bond documents contained statements and were offered for the truth of the matter asserted, they would have been admissible as party-opponent statements under Rule 801(d)(2)(A).

Tattoo

¶36 During trial, the prosecutor requested photos of Armenta's VGL tattoo and Armenta objected on the basis of late disclosure and relevance. The court concluded the tattoo was "highly relevant" and overruled Armenta's objection, notwithstanding the late disclosure. The tattoo depicted the letters "VGL" and was presented as evidence of Armenta's gang membership and participation.

R. Crim. P. 31.10(a)(7)(A); *see also State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶37 Armenta argues the court erred in admitting a photo of his VGL tattoo because he did not have the tattoo in 2010, when the letters underlying the basis of his charge were written, and, therefore it was irrelevant to his gang status or intent in 2010. The state counters that the tattoos were "relevant to show Armenta's intent and involvement with the gang, notwithstanding whether he had the tattoo at the time he wrote the letters that were the basis for the charge." We agree.

¶38 As noted, evidence is relevant and admissible if "it has any tendency to make a fact more or less probable than it would be without the evidence" and the fact "is of consequence in determining the action." Ariz. R. Evid. 401; *see also* Ariz. R. Evid. 402; *State v. Leteve*, 237 Ariz. 516, ¶ 48 (2015) (quoting *State v. Roque*, 213 Ariz. 193, ¶ 109 (2006), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254 (2017)) ("The threshold for relevance is a low one.").

¶39 And, "[e]vidence of gang affiliation is admissible when it is relevant to a material issue in the case." *Jackson*, 186 Ariz. at 26. Further, tattoos are one of the seven criteria listed in § 13-105(9) that indicate membership in a criminal street gang.

¶40 Contrary to Armenta's contention, the tattoo was relevant. In addition to the letters he had written and a document in which he proclaimed himself a tema, the tattoo was offered as evidence of his gang membership. And, although gang membership is not an element of participating in a criminal street gang, *see* § 13-2321(A), Armenta's gang affiliation is nevertheless relevant to the material issue of whether he participated in a criminal street gang, *see Jackson*, 186 Ariz. at 26. Further, even if Armenta did not have the VGL tattoo when he wrote the letters, the fact that he later received the tattoo is evidence that he had participated in a criminal street gang because, as explained by the gang expert, gang-related tattoos must be earned through participation and completion of work for the gang. Therefore, the court did not err in admitting a photo of Armenta's VGL tattoo.

Disposition

¶41 For the foregoing reasons, we affirm Armenta's conviction and sentence.